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05 June 2017

Version of attached file:

Accepted Version

Peer-review status of attached file:

Peer-reviewed

Citation for published item:

Brooks, Thom (2017) 'Hegel on crime and punishment.', in Hegel's political philosophy : on the normative significance of method and system. Oxford: Oxford University Press, pp. 202-221.

Further information on publisher's website:

<https://global.oup.com/academic/product/hegels-political-philosophy-9780198778165?cc=gblang=en>

Publisher's copyright statement:

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Hegel's Political Philosophy: On the Normative Significance of Method and System

Thom Brooks & Sebastian Stein (editors)

Oxford University Press

Chapter 10

Hegel on Crime and Punishment

Thom Brooks

Introduction

Perhaps the least controversial issue for most commentators on Hegel's political and legal philosophy concerns his theory of punishment. The orthodox consensus is that Hegel was a retributivist who justified punishing deserving criminals in order to 'annul' their crimes.¹ Broadly speaking, the classic 'positive' view of retribution is that punishment can only be justified where deserved and to the degree it is deserved.² In that light, some commentators have claimed Hegel is 'one of the most famous and important retributivists'.³

While they are often deeply divided on so many other issues in his philosophy, the orthodox consensus among Hegel scholars is no accident. Hegel offers us comments about punishment that support this interpretation. Hegel is clear that punishment is only justified where it is deserved by an offender for committing a crime.⁴ Punishment aspires to be a 'cancellation' of a crime and its ill-effects in a 'restoration of right' – restoring rights violated by a crime (*PR*, §99). Hegel says: 'the cancellation [*Aufheben*] of crime is *retribution*' (*PR*, §101). For most scholars, these well-known and widely cited passages make clear that Hegel understood his own theory of punishment as retributivist and it is such a theory. Allen Wood calls Hegel 'a genuine retributivist'.⁵

The orthodox consensus rests on a mistake. It fails to take sufficient account of Hegel's distinctive form of argumentation that runs deep throughout his philosophical system, including his comments about punishment. Hegel did not present his system and its unique argumentative structure in the standard form we find with most modern philosophers – and it is easy to downplay or overlook this fact not least since Hegel's dialectical form of argument is deeply controversial and seen as more of a problem for understanding Hegel's views than enlightening us as to what his views are.

¹ See Jami L. Anderson, 'Annulment Retributivism: A Hegelian Theory of Punishment', *Legal Theory* 5 (1999): 363–88; Stephen Paul Brown, 'Punishment and the Restoration of Rights', *Punishment and Society* 3 (2001): 485–500; David E. Cooper, 'Hegel's Theory of Punishment' in Z. Pelczynski (ed.), *Hegel's Political Philosophy: Problems and Perspectives* (Cambridge: Cambridge University Press, 1971): 151–67; J. Angelo Corlett, 'Making Sense of Retributivism', *Philosophy* 76 (2001): 80, n11; John Cottingham, 'Varieties of Retribution', *Philosophical Quarterly* 29 (1979): 244–45; Markus Dirk Dubber, 'Rediscovering Hegel's Theory of Crime and Punishment', *Michigan Law Review* 92 (1994): 1577–621; J. N. Findlay, *Hegel: A Re-examination* (London: George Allen & Unwin, 1958): 312–13; Lewis P. Hinchman, 'Hegel's Theory of Crime and Punishment', *Review of Politics* 44 (1982): 524; Michael Inwood, *A Hegel Dictionary* (Oxford: Blackwell, 1992): 232–35; Igor Primoratz, *Justifying Legal Punishment* (Atlantic Highlands, NJ: Humanities Press, 1989): 69–81; Peter G. Stillman, 'Hegel's Idea of Punishment', *Journal of the History of Philosophy* 14 (1976): 169–82 and Allen Wood, *Hegel's Ethical Thought* (Cambridge: Cambridge University Press, 1990): 108–24.

² See Thom Brooks, *Punishment* (London: Routledge, 2012): chapter 1.

³ Mark Tunick, *Punishment: Theory and Practice* (Berkeley: University of California Press, 1992).

⁴ For example, see *PR*, §95R ('Right, whose infringement is crime').

⁵ Wood, *Hegel's Ethical Thought*, 109.

In the following sections, I offer a *systematic reading* of Hegel's comments about punishment in his philosophical system with careful attention to his *Philosophy of Right*.⁶ I argue that the conventional reading which claims his theory of punishment is mostly confined to the section Abstract Right raises interpretive difficulties. One problem is the inadequacy of punishment as described in Abstract Right to be a complete theory of punishment so often overlooked. A second problem is accounting for apparent inconsistencies between what Hegel says in Abstract Right versus comments stated elsewhere in the *Philosophy of Right* and larger system. I argue that later sections like Ethical Life matter for our understanding Hegel's penal theory and a systematic reading of his texts – where we consider his arguments in light of their systematic structure – can help make best sense of this. I conclude by reflecting on the implications this reading has for our understanding Hegel's philosophy and its contemporary appeal.

The Orthodox Consensus of Hegel the Retributivist

The orthodox consensus on Abstract Right started with a landmark essay by David Cooper, published in 1971. He begins: 'In this essay I discuss Hegel's theory of punishment for its own sake. I am not concerned with its relation to the rest of the *Philosophy of Right*, and even less with its place in the dialectic as a whole'.⁷ Cooper's sole focus is on Hegel's comments about punishment in Abstract Right. Cooper argues that 'reform and deterrence cannot be the reasons' for justifying punishment – only a guilty person's desert can serve as such a reason.⁸ He does not find these arguments novel and notes that Kant's retributivist theory of punishment accepts the same view.⁹

Cooper's interpretation of Hegel's theory of punishment views it as a retributivist theory that can be understood within Abstract Right alone. This position has become the orthodox consensus over the near half century later. While there remain other important differences in the interpretations offered by Hegel scholars, they nonetheless are committed to the position first identified by Cooper.¹⁰ For example, Dudley Knowles remarked that Hegel's discussion of punishment beyond Abstract Right 'merely recapitulates the philosophical points made in the discussion of crime and punishment of Abstract Right'.¹¹ Allen Wood argues that Hegel's 'theory of punishment is well grounded in Hegel's theory of abstract right, and it succeeds, without appealing in any way to consequentialist considerations'.¹² In his groundbreaking

⁶ On the systematic reading, see Thom Brooks, *Hegel's Political Philosophy: A Systematic Reading of the Philosophy of Right*, 2nd edition (Edinburgh: Edinburgh University Press, 2013). See Thom Brooks, 'Is Hegel a Retributivist?' *Bulletin of the Hegel Society of Great Britain* 49/50 (2004): 113–26; Thom Brooks, 'Hegel's Ambiguous Contribution to Legal Theory', *Res Publica* 11(1) (2005): 85–94 and Thom Brooks, 'Hegel and the Unified Theory of Punishment' in Thom Brooks (ed.), *Hegel's Philosophy of Right* (Oxford: Blackwell, 2012): 103–23.

⁷ Cooper, 'Hegel's Theory of Punishment', 151.

⁸ Cooper, 'Hegel's Theory of Punishment', 152.

⁹ See Cooper, 'Hegel's Theory of Punishment', 152, 156.

¹⁰ For example, see Knowles, *Hegel and the Philosophy of Right*, 147 ('I am content to endorse the drift of Cooper's original reading').

¹¹ Knowles, *Hegel and the Philosophy of Right*, 153.

¹² Allen Wood, 'Hegel's Ethics' in Frederick Beiser (ed.), *The Cambridge Companion to Hegel* (Cambridge: Cambridge University Press, 1993): 221.

Hegel's Ethical Thought, Wood discusses punishment in his section on abstract right – providing a section-by-section interpretation of key ideas in Hegel's political philosophy.¹³ Cooper's central claims about Hegel's theory of punishment have become the consensus view.

The current orthodoxy can find evidential support for its position. In Abstract Right, Hegel provides a number of comments that could appear to justify a retributivist theory of punishment. He defines crime as an infringement of a right as a right, denying its relevance or importance (*PR*, §95). Where a right is violated, it is crucial that its existence is acknowledged and reasserted. Hegel claims we should try to cancel the crime – so it cannot be 'regarded as valid' – and produce 'the restoration of right' through punishing the criminal (*PR*, §99). This need for restoring rights arises not from a desire to cancel evil but recognize our rights (*PR*, §99R). Moreover, Hegel says the restoration of rights by punishing crimes 'is *retribution*' (*PR*, §101). The case for viewing Hegel's theory of punishment as retributivist might appear compelling.

However, such a conclusion is premature. Hegel understands a crime like theft as a denial of an individual's right to private property. The punishment of theft aims to recognize and support the right violated by crime. Punishing offenders is a way to protect and maintain the rights of individuals. This includes offenders, too. Hegel goes so far as to say that punishment is 'a right for the criminal himself' (*PR*, §100). Punishment provides for the acknowledgement and reassertion of rights for all. Punishing a thief for his theft recognizes the importance of the right to property that was infringed by the crime by restoring its status as a right that should not be violated. Through punishment the rights of all – including the offender's rights – are reasserted. Punishment is not about damaging an offender's rights, but maintaining them.

This appears to lead Hegel to reject non-retributivist theories of punishment like deterrence. Punishment aims at achieving justice restoring rights because they should be so maintained. The problem with deterrence justifying punishment is that it might fail to honour the offender by punishing her not to protect and maintain the rights of all but for some other purpose (*PR*, §100R). Hegel says that such a view justifies punishment 'like raising a stick at a dog; it means treating a human being like a dog instead of respecting his honour and freedom' (*PR*, §99A). The rights that every individual should respect are worthy of our respect and capable of being recognized as such. To justify punishment as a deterrent or form of rehabilitation is to regard offenders like 'a harmful animal which must be rendered harmless' (*PR*, §100R). Such statements support the orthodox retributivist reading of Hegel's penal theory.

Retribution also appears to inform how Hegel justifies the distribution of punishment. This seems unequivocal. He says: 'the cancellation [*Aufheben*] of crime is *retribution*' (*PR*, §101). Hegel explains that crime and retribution share an 'identity' based not on strict equality, but on equal value (*PR*, §101). Rejecting the eye for an eye doctrine of the *lex talionis*, Hegel argues:

It is very easy to portray the retributive aspect of punishment as an absurdity (theft as retribution for theft, robbery for robbery, an eye for an eye, and a tooth for a tooth, so that one can even imagine the miscreant as one-eyed or toothless...equality remains merely the basis measure of the criminal's essential deserts, but not of the specific external shape

¹³ See Wood, *Hegel's Ethical Thought*, 108–24. While he does make reference to later sections in the *Philosophy of Right* and other works by Hegel, Wood's discussion is focussed firmly on Abstract Right.

that theft and robbery [on the one hand] and fines and imprisonment etc. [on the other] are completely unequal, whereas in terms of their value, i.e. their universal character as injuries [*Verletzungen*], they are *comparable* (PR, §101R).

Hegel's point is that giving offenders what they deserve is not the same as doing a similar act to them that they did to others. A reason for this view is strict equality does not seem to apply to most, if any, crimes. Some crimes are self-regarding like consuming an illegal substance or parking violations. But it is far from obvious how a like for like punishment could work for someone parked illegally or smoking crack cocaine. Even visiting physical harm on those that did violence to others does not work in any clear sense. Part of what makes a violent assault wrongful is the innocence of the victim. If the state were to do to violent offenders what they did to others, they do not impose a harm on someone innocent and the circumstances are very different – even here it is no like for like treatment.

Hegel argues instead for the view that we do not consider crimes separately – in terms of how to punish equally a theft or a murder as different entities – but in relation to each other that is comparable in value. Crimes share a common nature as wrongful violations of rights that justify imposing punishment on a deserving offender. Crimes differ with respect to the relative value of their wrongfulness and corresponding punishment – some crimes require greater punishment than others. But it is the value of wrongfulness that does this work. Offenders are punished because they deserve it and to the degree it is deserved. An offender's punishment 'is merely a manifestation of the crime' (PR, §101A).

In sum, my purpose in this section was to indicate the key textual evidence that supports the orthodox consensus view that Hegel held a retributivist theory of punishment and that this account can be understood from Abstract Right without substantive recourse to other parts of the *Philosophy of Right*. There is a case to argue and few consensus views commanding such widespread agreement – not least among commentators on Hegel's controversial philosophy – lack some form of support.¹⁴

The Poverty of Abstract Right

The orthodox consensus is able to provide textual support for a retributivist theory of punishment drawn entirely from the section Abstract Right that starts Hegel's substantive discussion of his political philosophy. However, this interpretation suffers from two flaws. The first is that Abstract Right does not provide the unambiguously retributivist picture that orthodoxy claims. The second flaw is that the orthodox consensus fails to interpret Hegel's comments in Abstract Right within the *systematic* philosophical structure by which they are meant to be understood. I will now consider these flaws in turn and show how the orthodox consensus overlooks key features of Hegel's comments about punishment in Abstract Right and they are mistaken about how these comments should be considered in light of his remarks beyond Abstract Right.

¹⁴ My discussion has not been comprehensive, but indicative. My aim is to make clear there is some support in Hegel's Abstract Right for the orthodox consensus view. In following sections, I show that Abstract Right is ill-suited as the sole repository of a retributivist theory of punishment and that these comments may be incoherent with Hegel's comments elsewhere.

Abstract Right plays a central role in setting out a retributivist vision, but this section develops a more complex analysis than that – the closer we look, the less retributivist his views become. Hegel defines ‘crime’ in Abstract Right in a particular way. He understands it as a wrong where an individual fails to recognize what is right: ‘the recognition of right’ is ‘the universal and deciding factor’ (*PR*, §85). This failure to recognize what is right is neither unintentional nor meant to deceive, but acting without regard to what another’s point of view could plausibly consider what is right.¹⁵ Crime is different because of what it is ‘in itself’: an appeal to my particular point of view alone (*PR*, §83).

This is a problem because what is right is not determined by reference to my own view without regard to others. Right is held universally in common (*PR*, §87A). Crimes fail to recognize the special status possessed by right. Hegel’s example of a crime in Abstract Right is ‘the violation of a contract through failure to perform what it stipulates’ (*PR*, §93R). He is discussing the contractual stipulations arising from the unreal hypothetical scenario where two persons agree about the property possessions of the other. Hegel is not considering who they are or their other particularities. Nor does he discuss what the property is or how it became possessed. This contractual agreement is not subject to any law or courtroom, but merely a hypothetical mutual recognition of right between two nondescript persons – where the ‘crime’ is one’s failure to respect and validate the other’s claim to some thing.

It is striking that Hegel’s description of crime in this case is of breaking a contractual stipulation. Contracts are commonly understood to be the province of private law – and so not a part of the criminal law. Nor is this scenario clearly theft. Typically, theft is defined as dishonestly intending to permanently deprive another of some possession belonging to another.¹⁶ But this criminal view of theft is not clearly the picture that Hegel has in mind. For Hegel, crime ‘in itself’ is a failure of recognition akin to general illegality.

My point is that not all illegality is criminal – it can be civil, such as with contract law. This is important because it begins to highlight that Hegel’s understanding of a ‘crime’ is not ours. Instead, it should be thought of in terms of general illegality, including what might constitute criminality. So not only is Hegel’s use of ‘crime’ about crimes *per se*, they are not about laws from a Parliament or king either.¹⁷

But it is clear that while Abstract Right may be the key to understanding an important part of Hegel’s views at the beginning, it cannot be the conclusion at its end. This problem of interpretation concerns not only *what* is claimed for Hegel’s views but *how* we should understand them. Hegel is clear that his discussion of crime and punishment in Abstract Right

¹⁵ Hegel speaks of ‘the point of view of right in itself’ (*PR*, §83A).

¹⁶ For example, see the five part definition of the offence of theft in England and Wales: section 1(1) of the Theft Act 1968.

¹⁷ A crucial implication follows from this insight. If by ‘crime’ Hegel means any form of illegality (including crimes), then punishment – as a response to crime – is a response to ‘crime’ and so connected to illegality (including criminality). My point is that Hegel’s discussion of crime and punishment at this stage is so generalised as to be about illegality and its response, but not the criminal law and sentencing in particular. The following discussion will focus on crime and punishment, but broadly speaking – in Abstract Right – neither Hegel’s use of ‘crime’ or ‘punishment’ is what we might initially expect from his using such terms. It should now be clear he has a different meaning for them which is routinely overlooked. But it should also be clear that this non-standard way of understanding everyday terms may go some way to helping explain why interpreters have been mistaken about his theory of crime and punishment.

matters for later consideration of these issues. He says: 'But the substantial element within these forms is the universal, which remains the same in its further development and in the further shapes it assumes' (*PR*, §95R). This means that the key understanding of crime as general illegality characterized by a failure of recognition is the 'substantial element' that is 'universal' to all forms of illegal remaining 'the same in its further development'.¹⁸

Punishment 'is merely the negation of the negation' (*PR*, §97A). Its purpose is to nullify crime by reaffirming the right that illegality contravened and restore right to its proper recognition. This is called 'the restoration of right' whereby punishment cancels the existence of some criminal wrong 'which would otherwise be regarded as valid' (*PR*, §99). Hegel's point is that illegality is wrongful as a failure to recognize what is right and universal. The offender asserts a private view above what is right and without regard for what is right. Hegel's thief is a thief because he seeks to possess something now; the thief is not making any claims about the property rights for all in general – because these are not his concern.

The 'cancellation of crime', for Hegel, 'is retribution' (*PR*, §101). If this were left unpunished, then it sends out a signal that such behavior is permissible and not contrary to right. You or I could be led to the false belief that we might act similarly. For right to exist 'externally', it must be reasserted and restored through some form of reaffirmation. False claims of ownership must be exposed for what they are, possessions returned to their rightful owners and thieves punished in relation to the gravity of their wrong. Justice should be done and punishing deserving offenders an important part of doing justice for Hegel. This helps explain Hegel's comment that punishment is 'a right for the criminal himself' (*PR*, §100). By punishing the offender, we reassert and restore the right violated for all. Additionally, we also reassert and restore this right for the offender, too. The restoration of rights is more than a benefit for the law-abiding community, but it honours the rights of offenders as well.¹⁹

The comment that receives a great many approving citations as proof that Hegel is a retributivist is this claim that all relevant modalities of punishment 'take it for granted that punishment in and for itself is just' (*PR*, §99R). Such a view is thought to be a clear case of Hegel's retributivism. It is supported further by Hegel's comment in the section's Addition that deterrence should be rejected because 'it means treating a human being like a dog instead of respecting his honour and freedom' (*PR*, §99A).

However, this is also incorrect. Hegel's claim about punishment being just 'in and for itself' is consistent with his view that 'crime' as general illegality is following one's own subjective view without regard to what is right and held in common. So Hegel's apparent retributivism is hardly retributivist: it is only the claim that punishment can only be justified for illegality, and that punishment is a response to this illegality with a view to reaffirming and restoring violated rights. Hegel says nothing about moral responsibility for wrongdoing here nor how much punishment is deserved. This is very different from classic views of retributivism which holds that criminals are to be punished because they are morally responsible for some immoral wrongdoing – and punished to the degree they are responsible for this wrongdoing irrespective of the wider context. Hegel says no such thing.

¹⁸ See also *PR*, §99R ('the essential factor is the concept').

¹⁹ See *PR*, §100R ('In so far as the punishment which this entails is seen as embodying the criminal's own right, the criminal is honoured as a rational being').

His comment about deterrence is very specific. Hegel's criticism is of those who 'justify punishment...like raising one's stick at a dog' (PR, §99A).²⁰ If we confirm that someone meets the test of illegality through a failure of recognition, then punishment is not justified in that way and so its different justificatory foundation may be open to the use of deterrence where punishment is deserved. This might avoid the objection that an offender's 'honour and freedom' were not respected. So long as deterrence is not the primary ground for punishment, it might still serve a justificatory purpose.²¹ This important point must be kept in mind when we consider later passages where Hegel says more about how retribution, deterrence and rehabilitation might fit together. All that should be noted here is that his criticism of deterrence is only as the ground for distinguishing someone as a criminal. The use of deterrence in other ways is not ruled out provided the ground is justified by what he means by retribution.

Likewise, Hegel's remark that 'the cancellation of crime is retribution' is also very specific (PR, §101). Hegel notes that crime and punishment share an equivalency of value, but not 'the specific character of the infringement' (PR, §101). We are not to punish offenders in the same form they have harmed others, such as punching someone convicted of battery. The crime will have a value of wrongdoing that should be equivalent to the value of punishment.

For Hegel, this kind of retribution gets right the fact that there is a 'universal feeling of peoples' that a crime 'deserves to be punished' and 'that what the criminal has done should also happen to him' (PR, §101R). This will appear a strong statement of retribution whereby punishment must be deserved and in proportion to what is deserved – and this is where Hegel's discussion is more nuanced.

Hegel recognizes that 'the determination of equality has brought a major difficulty into the idea of retribution' (PR, §101R). Foreshadowing his later comments on punishment, he notes that 'even if, for this later determination of punishments, we had to look around *for principles other than those which apply to the universal aspect of punishment*, this universal aspect remains what it is' (PR, §101R (emphasis added)). Hegel's point is that punishment can only be justified where it is deserved – and this link between crime and punishment is a 'necessary connection' (PR, §101R).

Their value can only be of an 'approximate fulfilment' (PR, §101R). Hegel claims that:

it is very easy to portray the retributive aspect of punishment as an absurdity (theft as retribution for theft, robbery for robbery, an eye for an eye, and a tooth for a tooth, so that one can imagine the miscreant as one-eyed or toothless); but the concept has nothing to do with this absurdity, for which the introduction of that [idea of] *specific equality* is to blame (PR, §101R).

This still reads like a fairly conventional understanding of retribution. Few retributivists argue that the state should rape rapists or torture torturers. Hegel still defends the idea that punishment should be deserved and its value an 'approximate fulfilment' of the value of its corresponding crime.

²⁰ Some penal theorists take Hegel's comment here about deterrence to be a complete rejection of the place of deterrence in penal theory. This reading misunderstands the narrowness of Hegel's rejection. See R. A. Duff, *Punishment, Communication, and Community* (Oxford: Oxford University Press, 2001): 14, 16, 85.

²¹ See Brooks, *Hegel's Political Philosophy*, 44.

But we must attend to the distinctive meaning that Hegel has in mind here. He says that the value equality between crime and punishment ‘remains merely the basic measure of the criminal’s *essential* deserts, but not of the specific external shape which the retribution should take’ (PR, §101R). This is explained further in an Addition where Hegel says ‘retribution is the inner connection’ between crime and punishment (PR, §101A). Hegelian retribution is but one essential part of punishment that requires that punishment is only justified as a response to crime where the value of one is linked to the other. This connection is not explicitly moral insofar as punishment is not set in accordance to the evil performed by someone, but instead to reaffirm and restore rights. In this sense, Hegel’s view of desert is more political than moral although there is no denying the moral significance that rights can have.²²

Immanuel Kant’s retributivist theory of punishment is a useful counterexample to help sharpen the emerging differences between Hegel’s understanding of ‘retributivism’ and how most retributivists view it.²³ In his *Metaphysics of Morals*, Kant argues that legal punishment ‘can never be inflicted merely as a means to promote some other good for the criminal himself or for civil society. It must always be inflicted upon him only because he committed a crime’.²⁴ This is important because it means that the *amount* of punishment should never be determined by *external factors* – offenders are to be treated individually and the wider socio-political context is irrelevant for determining what is deserved.²⁵

This understanding of retributivism as centered on an individual’s desert and absent any external factors is attributed to Hegel.²⁶ However, his theory of punishment is a significant break from this view insofar as he argues – and this is found clearly in Abstract Right – that contextual external factors can shape the amount of punishment that is deserved by an offender. The importance of these factors for determining punishments is developed in greater detail in later sections like Ethical Life.²⁷ Yet it is clear already that such factors are relevant. This is one key feature that distinguishes what Hegel means by retribution from how most retributivists have.

Kant’s retributivism is different from Hegel’s penal theory for a second reason. Kant argues that there is a ‘principle of equality’ where:

accordingly, whatever undeserved evil you inflict upon another within the people, that you inflict upon yourself. If you insult him, you insult yourself; if you steal from him,

²² See Thom Brooks, ‘Punishment: Political, Not Moral’, *New Criminal Law Review* 14(3) (2011): 427—38.

²³ See Thom Brooks, ‘Kant’s Theory of Punishment’, *Utilitas* 15(2) (2003): 206—224 and Thom Brooks, ‘Kantian Punishment and Retributivism: A Reply to Clark’, *Ratio* 18(2) (2005): 237—45.

²⁴ Immanuel Kant, *The Metaphysics of Morals*, ed. Mary Gregor (Cambridge: Cambridge University Press, 1996): 105 [6:331].

²⁵ I qualify my statement with ‘for determining what is deserved’. This is to recognise that there can be some flexibility exercised by the monarch to grant pardons or alternative sanctions like deportation. But this does not invalidate the fact that, for Kant’s retributivism, offenders deserve a different punishment that they should otherwise receive. See Kant, *The Metaphysics of Morals*, 107 [6:334].

²⁶ See Wood, ‘Hegel’s Ethics’, 221.

²⁷ To restate this point in now older political theory terminology of liberalism versus communitarianism, standard retributivist accounts like Kant argue for a more liberal conception because it is individualistic. Our concern is only with the offender’s desert and not any external factors. However, Hegel’s account is a more communitarian conception where the offender’s desert is important – if it is absent, no punishment can be justified – but external factors are relevant for whether we punish and how much we should punish.

you steal from yourself; if you strike him, you strike yourself; if you kill him, you kill yourself.²⁸

As we have seen, Hegel rejects the view that the external shape of punishment must somehow mirror the external action of the offender. Hegel is opposed to the *lex talionis*. Instead, we should aim for an approximate fulfilment in value of what an offender deserves. Hegel might criticize Kant's retributivism on these grounds as a kind of 'empty formalism' and so not only a concern about Kant's moral theory, but his penal theory, too (*PR*, §135).

Nonetheless, to claim Kant's theory of punishment blindly supports doing to offenders what they did to their victims would be uncharitable at best. For Kant, the equality of a crime with its punishment – in what he calls 'the law of retribution (*ius talionis*)' – is about punishing 'every criminal in proportion to his *inner wickedness*'.²⁹ Offenders do not merely break the law, but the *moral* law and so every criminal act or omission is immoral to some degree. Offenders deserve punishment because they have performed an immoral wrong where the greater the evil – or 'inner wickedness' – the more severe they should be punished. For Kant what matters is the inner wickedness of the offender: his deserving punishment for his immoral activity is what counts and not other factors.

However, for Hegel, an offender deserves punishment on account of violating right – which may or may not be understood as 'wickedness' or evil – and this alone is what *retribution* means for him. It is not an offender's inner wickedness alone that determines how much punishment is deserved. Retribution for Hegel is about considering *if* punishment might be deserved. Whether or not it is distributed – and its amount – must take account of additional factors.

Some interpreters, like Knowles, argue that Hegel offers an identifiable retributivism not far away from Kant's theory. If more than one form of punishment is consistent with the value of crime, then we are perfectly entitled to appeal to other non-retributivist factors 'without sacrificing the retributivist ideal' in making our sentencing choice.³⁰ So long as the values are approximately equal, the purposes by which we choose form of punishment over another is unimportant or nonconsequential – or so Knowles argues. He might similarly claim that not unlike how Kant determines a value for punishment linked to the moral wrongness of its corresponding crime, so too does Hegel. The form that punishment takes is unimportant as long as whatever punishment is selected has the appropriate value.

Knowles misunderstands how retribution works for Hegel. It does not offer us a timeless, 'ideal' value that is fixed irrespective of background circumstances. So it is not the case that there is some ideal value – provided to us by way of retribution – that we can use to set deterrent or rehabilitative punishments to.

Alan Brudner provides us with a useful distinction.³¹ He argues that most retributivist theories of punishment should be understood as theories of *moral* retributivism. These accounts give morality central importance: an act or omission is criminal for its meeting some threshold of

²⁸ Kant, *The Metaphysics of Morals*, 105 [6:332].

²⁹ Kant, *The Metaphysics of Morals*, 105–6 [6:332–33].

³⁰ Knowles, *Hegel and the Philosophy of Right*, 158.

³¹ See Alan Brudner, *Punishment and Freedom: A Liberal Theory of Penal Justice* (Oxford: Oxford University Press, 2009): 38–55.

immorality – and it is to be punished in proportion to its immorality. Some retributivist theories of punishment rest on a different justification and these views are called *legal* retributivism. This account claims that offenders deserve punishment on the more narrow and limited justification that the offender commits a crime. It is this act or omission resulting in a public wrong like illegality that is what any offender must possess to be held deserving of punishment.

Brudner rightly views Hegel as an early exponent of legal retributivism and this perspective is illuminating as an accurate interpretation of Hegel's position in *Abstract Right*. Commentators accepting the orthodox consensus that Hegel is a retributivist fail to see how narrow Hegel's understanding of how crime and punishment are related. In *Abstract Right*, Hegel makes the case for their necessary connection – but he has not made a full case for determining when it should be distributed and setting the amount of punishment that can and should be deserved. Yet even here Hegel breaks clearly from standard retributivist accounts, such as Kant's retributivist theory, with a *legal* form of retributivism where external factors like the wider context matters.

In sum, this section looked more closely at Hegel's discussion of punishment in *Abstract Right*. It reveals several findings. First, 'crime' is understood in a non-legal way. It is about the failure to recognize right. This is important for Hegel because it is a fundamental feature that must be present for any further determination of crimes like theft, murder and the like. However, this view of crime is not unique to it and fundamental to any form of justified illegality, including violations of contracts in private law. To argue that Hegel offers a fleshed out theory of criminal law because he uses the word 'crime' misunderstands the distinctive meaning that Hegel has for it.

Secondly, punishment is a response to crime that seeks to cancel it by restoring and reaffirming what is right. If all illegality is fundamentally violations of right, then punishment attempts a reversal. This is to send a signal that what is right has existence – through punishment we secure the rights of all, including the rights of the punished offender. As a response, punishment is deserved in a narrow, legal sense: an offender deserves punishment because he has committed an offence. It is this necessary connection of crime and its deserved punishment that is called retribution by Hegel.

Thirdly, Hegel's use of retribution is not explicitly individualistic or moralistic. This is made clear by the contrast with Kant's retributivism. Kant argues criminals are to be punished for their moral wrongdoing – in violating the moral law – and in proportion to its gravity. External factors are irrelevant for determining the amount of punishment any offender can deserve. On the contrary, Hegel argues for an 'approximate fulfilment' between the value of crime and its linked punishment, but he does not yet say how it should be set. While retribution is an essential 'inner connection' between crime and its punishment, Hegel is open to non-retributivist factors determining the distribution and amount of punishment (*PR*, §101R). Admittedly, his discussion of what this might look like is not fleshed out in *Abstract Right*. This fact coupled with the unconventional use of the words 'crime' and 'retribution' may go some way to explaining why the orthodox consensus has failed to notice its interpretative errors before.

This leads us to consider two issues. The first is what Hegel has to say beyond *Abstract Right* that might help flesh out the gaps in his theory concerning the distribution and amount of punishment. The second concerns how later remarks should be understood in relation to his

comments in Abstract Right. This is the second interpretive flaw noted at the beginning of this section: namely, that the failure to understand Hegel's comments within the systematic philosophical structure they are meant to be considered is a reason why the orthodox consensus is mistaken about Hegel's theory of punishment. I turn to these issues now.

Why Ethical Life Matters

The orthodox consensus view on Hegel's theory of punishment claims that only Abstract Right matters – the later discussion in Ethical Life has little significance. This is a reading that fails to take Hegel at his word, as he explicitly argues that his work should be read in a systematic way where concepts, including crime and punishment, are developed and fleshed out as we proceed through a dialectical process.

The orthodox consensus is endorsed in different ways by all leading commentators. For example, Wood says that only in Abstract Right does Hegel provide 'his treatment of punishment proper'.³² Knowles says of Ethical Life that 'although it adds much more detail concerning its institutional articulation and practical application' Hegel's theory of punishment is not developed in any substantive way from this later discussion.³³ Peter Stillman says:

Neither morality nor society exist at the level of abstract rights, where Hegel primarily discusses punishment. Hegel does introduce further, non-abstract right aspects of punishment later – a law code, some concern with intention, pardon, crimes against the state, and a system for the administration of justice – but these produce only minor additions and no essential changes to the theory of punishment at abstract right – except, of course, to make the abstract into the concrete and existent.³⁴

To summarise in the words of John Findlay, Hegel's treatment of punishment after Abstract Right is 'in no way remarkable'.³⁵

But all this is incorrect. Towards the end of Abstract Right, Hegel says that 'in this sphere of the immediacy of right, the cancellation [*Aufheben*] of crime is primarily revenge' (*PR*, §102). Hegel qualifies this statement in the section's Addition: 'In a social condition in which there are neither magistrates nor laws, punishment *always* takes the form of *revenge*' (*PR*, §102A (emphasis added)). Recall that Hegel's discussion in Abstract Right is about individuals *abstracted*, and so thus removed, from their concrete circumstances. There are no laws, no police, no courts and no prisons. We should remember that by 'crime' Hegel is not even talking about the criminal law, but general illegality – and that it shares a fundamental feature, namely, a failure to recognize rights. Abstract Right's use of 'retribution' is little more than a claim that the failure to recognize right must be corrected by reaffirming right, to breathe life once again into what should exist – and this is the purpose behind punishment and how we should respond to illegality overall. Hegel separates form from content

³² Wood, *Hegel's Ethical Thought*, 118.

³³ Knowles, *Hegel and the Philosophy of Right*, 153 and see 161.

³⁴ Stillman, 'Hegel's Idea of Punishment', 170 n5.

³⁵ Findlay, *Hegel*, 8.

Scholars should not play down the philosophical importance of Hegel's discussion of crime and punishment in Ethical Life. It is often overlooked that the idea that context matters – undermining any claims to some strong retributivist picture – can be found in Abstract Right, too. Hegel says:

Various qualitative determinations [of crime], such as *danger to public security*, have their basis in more precisely determined circumstances, but they are often apprehended only indirectly in the light of other circumstances rather than in terms of the concept of the thing [*Sache*]. Thus, the crime which is more dangerous in itself, in its immediate character, is a more serious infringement in its extent and quality (*PR*, §96R).

Public security as societal maintenance of right has a key role in determining the seriousness by which we see crime and consider its punishment. Context clearly matters not for informing us of *what* is criminal, but helping us determine *how* wrong it is and so what punishment is appropriate. Hegel adds: 'It is not the crimes or punishments themselves which change, but the relation between the two' (*PR*, §96A).

It is remarked by interpreters like Knowles – quoted above – that Hegel's later treatment of punishment in the *Philosophy of Right* is merely detail and nothing philosophically substantive. But this claim that all the philosophical activity is to be found in Abstract Right alone does not survive scrutiny. An example regularly touted in support of the orthodox view that later comments are philosophically less substantive or important can be found here:

The various determinations which are relevant to punishment as a phenomenon [*Erscheinung*] and to its relation [*Beziehung*] to the particular consciousness, and which concern its effect on representational thought (as a deterrent, corrective, etc.), are of essential significance in their proper context, though primarily only in connection with the *modality* of punishment. But they take it for granted that punishment is and for itself is *just* (*PR*, §99R).

Hegel's comments are thought to make clear that the form of punishment has little general importance because they concern only 'the modality of punishment'. Hegel is making the point that whatever else punishment is that it must be just – and this is true for all the 'various determinations' relevant to punishment.

This is incorrect. The modality of punishment is not determined here. Hegel avoids saying here that punishment is *in toto* retribution, deterrence, rehabilitation or some other view. It is striking that Hegel's claim that modality is to be determined later is somehow taken as evidence that he is accepting only one – retributivism – here. It is hardly surprising that Hegel takes seriously form and content, and not least with punishment where the form's 'essential significance' in its 'proper context' has yet to receive consideration. And so no judgement can or should be made in Abstract Right about punishment's modality across all cases.

While many commentators play down Ethical Life as a mere application of ideas found in Abstract Right, Hegel does not view the relation of these sections in that way. In his discussion of law, he claims that 'when right comes into existence primarily in the form of being posited, it also comes into existence in terms of *content* when it is *applied to the material* of civil society' (*PR*, §213). Right gains content through its application – it has substance and not purely formalistic. Part of this content is found in the contingency of applying concepts to the world

(*PR*, §214A). Hegel says: ‘For example, the magnitude of a punishment cannot be made to correspond with any conceptual definition, and whatever is decided will in this respect always be arbitrary. But this contingency is itself necessary’ (*PR*, §214A).

As already foreshadowed by his early remarks in Abstract Right, Hegel claims that the distribution and amount of punishment is *not* determined by an individual’s state of mind alone, but external factors like a crime’s potential ‘danger to society’ (*PR*, §218). He says: ‘its danger to civil society is a determination of its magnitude... This quality or magnitude varies, however, according to the *condition* of civil society’ (*PR*, §218R). The argument can be explained in the following way. Crime is a failure to recognize right. Punishment seeks to cancel this failure and reaffirm right. This transpires within a wider context – and Hegel takes this context seriously. All thefts may share specific features in general as attempts to permanently deprive another of her possessions. Hegel’s point is that the damage done to this right to own property, in this example, and reaffirm it can shift in value due to external factors.

Hegel clarifies what these factors relating to the condition of civil society might look like. Of importance is ‘the very stability of society’ (*PR*, §218A). The more stable a society is – or when it is more ‘sure of itself’ – then the ‘greater leniency in its punishment’ (*PR*, §218). Crime might then be seen ‘in a milder light, so that its punishment also becomes milder’ (*PR*, §218A). A stable society that is self-confident and relatively harmonious is less threatened by crime; offences do not pose as chilling a threat to it.

The situation is very different for a civil society that is less stable. For example, a society plagued by deep internal tensions or engaged in war provides a very different context. Criminal violations are viewed as more dangerous as a result. Therefore, ‘a penal code is therefore primarily a product of its time and of the current condition of civil society’ (*PR*, §218R). This means that the punishment of crime must take into account contextual matters like the stability of civil society and the potential harm a crime might pose to it. Such factors might be contingent and a product of circumstances beyond the control of any government, but for Hegel this contingency is a necessary feature in helping us determine if we punish and how much punishment we distribute.³⁶

Hegel’s theory of punishment will justify different punishments for the same kinds of offences over time as circumstances change. He says: ‘harsh punishments are not unjust in and for themselves, but are proportionate to the conditions of their time; a criminal code cannot be valid for every age, and crimes are semblances of existence which can meet with greater or lesser degrees of repudiation’ (*PR*, §218A). This is not relativism. Hegel is not defending an overly conservative view that however we punish is justifiable. Crime and punishment share a necessary

³⁶ I mention that only in Ethical Life do we gain insight into *if* we should punish. Hegel is clear that monarchs can issue pardons and remarks that the wider context – and possible consequences of issuing a pardon – can justify its use. So whereas Abstract Right merely tells us crime and punishment have a necessary link with each other, the fact of crime need not mandate punishment where there are suitably important contextual factors supporting the use of pardons. But note that no circumstances would warrant the punishment of an innocent person. Punishments are only deserved by criminals, but not every criminal may deserve the same punishment – or any punishment – even where two or more have committed the same offence. Context matters and this is another reason why Hegel’s theory of punishment is not like any other retributivist theory – and why it should be understood as a different approach altogether. See Thom Brooks, ‘No Rubber Stamp: Hegel’s Constitutional Monarch’, *History of Political Thought* 28 (2007): 91–119.

connection – and we cannot punish the innocent. This fundamental building block for how we should approach crime and punishment is crucial.

It is also of central importance that what we change over time is not the conception of what a theft, murder or rape is, but how they are punished. All thieves commit thefts and all murderers have murdered. These offence-types like theft or murder exist over time as categories. For Hegel, a theft during peace time is the same offence-type as a theft committed during civil war. But the thieves are not the same all the way down because the circumstances surrounding their thefts can be different. It is this difference in circumstances that is substantively important for informing how we should punish offenders. Hegel distinguishes between ‘crime *in itself* is an infinite injury’ and so as an offence-type is resistant to change over time (*PR*, §218R). Yet its measurement ‘in terms of qualitative and quantitative differences’ are context-dependent ‘since its existence is essentially determined as a representation and consciousness of the validity of the laws’ with ‘its danger to civil society is a determination of its magnitude’ (*PR*, §218R). Interpreters that claim context has no substantive part to play fail to grasp the fact that punishment is an institutional practice *in the world* and not apart from it. Only in some heavenly, unreal beyond are all crimes to be the same independently of their becoming *real*. Punishment is a practice in human community and the wider circumstances pertaining to justice are relevant to the just administration and distribution of any criminal justice system.

An example of how crimes are never fixed for any specific punishment is Hegel’s views on the death penalty. A well known defender of capital punishment, Hegel says:

although retribution cannot aim to achieve specific equality, this is not the case with murder, which necessarily incurs the death penalty. For since life is the entire compass of existence [*Dasein*], the punishment cannot consist [*bestehen*] in a *value* – since none is equivalent to life – but only in the taking of another life (*PR*, §101A).

Hegel’s argument is that death is an appropriate punishment for murder, but not because it is a life for a life. Instead, murderers should be executed because the most serious offence should be punished with the highest gravity. That the murderer has taken a life and the most appropriately grave punishment is his death is a coincidence.³⁷ What counts is the comparative value and we should not be misled into thinking Hegel’s support for the death penalty is grounded on some view of the *lex talionis* or some idea that punishments should mirror their corresponding crimes.

But nor is Hegel’s support for capital punishment absolute or timeless. In making some remarks about Beccaria’s theory of punishment, Hegel says: ‘The death penalty has consequently become less frequent, as indeed this ultimate form of punishment deserves to be’ (*PR*, §100A). For Hegel, a crime may warrant execution as a punishment, but this might change over time as circumstances evolve. And his support for the death penalty is far from unequivocal in claiming it ‘deserves’ to become less frequent. This comment fits his later remarks about how the stability of civil society influences the amount of punishment: as society becomes more secure, the need for punishments like the death penalty start to dissipate.

In Ethical Life, Hegel explicitly refers back to his Abstract Right discussion claiming that ‘the right against crime takes the form of revenge’ and that ‘it is merely right in itself’ (*PR*,

³⁷ I am grateful to Brian O’Connor who first raised this crucial point with me. See Thom Brooks, ‘Corlett on Kant, Hegel and Retribution’, *Philosophy* 76 (2001): 562–73, at 576 n. 71.

§220). It is not yet ‘in a form that is lawful’ and lacks ‘existence’ (*PR*, §220). Punishment becomes ‘objective’ when it ‘restores’ what is right ‘through a cancellation of crime’ (*PR*, §220). What is key here is that there is a difference between a restoration of right in theory versus what would be entailed in practice. If circumstances recommend more lenient or harsh punishments to achieve its goal of the restoration of right, then this has real significance for our thinking about punishment’s justification as a practice in theory and in fact.

This still leaves a missing part in the argument. If context matters and conditions might warrant more or less punishment to deserving offenders, how should we make judgements about when and how to punish? How we distribute punishment seems opaque.

The orthodox consensus has not caught onto this problem. This is because it fails to take seriously Hegel’s comments – even in Abstract Right – where he says the context matters in a non-retributivist way and it turns a deaf ear to Hegel’s later remarks in Ethical Life where he substantiates these comments further. Before making further progress, it must be noted that the standard orthodox reading is not the best interpretation of the comments Hegel offers. Abstract Right is not the only source of comments detailing the substantive content of his theory of punishment. But even if it was, Hegel still denies the standard retributivist reading widely attributed to him.

Punishment aims at the restoration of right. The context within which we punish has significance for shaping the values of crime and punishment that we seek to fulfil approximately. If non-retributivist factors can matter, how should they? This crucial question may be answered if we look elsewhere in his philosophical system – after all, Hegel claims his arguments are linked in a systematic way across texts.³⁸

In his *Science of Logic*, Hegel says:

Punishment, for example, has various determinations: it is retributive, a deterrent example as well, a threat used by the law as a deterrent and also it brings the criminal to his senses and reforms him. Each of these different determinations has been considered the *ground of punishment*, because each is an essential determination, and therefore the others, as distinct from it, are determined as merely contingent relatively to it. *But the one which is taken as ground is still not the whole punishment itself.*³⁹

This passage is remarkable in two ways. First it defines ‘retribution’ in a very narrow way – that is consistent with Hegel’s use of this term in Abstract Right. Hegel’s understanding of ‘legal’ retribution is only the necessary connection between crime and punishment. This leaves open a space for determining the amount of punishment so long as it is distributed to a deserving person. So the first point we should recognize is that Hegel’s later view of retribution in the *Philosophy of Right* is consistent with his view published several years earlier in the *Science of Logic*.

³⁸ Hegel says of the *Philosophy of Right* in its opening paragraph: ‘This textbook is a more extensive, and in particular a more systematic exposition of the same basic concepts which, in relation to this part of philosophy, are already contained in a previous work designed to accompany my lectures, namely my *Encyclopaedia of the Philosophical Sciences*’ (*PR*, 9). The *Encyclopaedia* is Hegel’s philosophical system in outline and the *Philosophy of Right* fleshes out one part of it, ‘Objective Spirit’. See G. W. F. Hegel, *Philosophy of Mind* (Oxford: Oxford University Press, 1971): §§483—552.

³⁹ G. W. F. Hegel, *Science of Logic*, 465 (emphasis added).

The second remarkable feature about this passage is that it is perhaps the first explicitly ‘unified theory’ of punishment defended. Hegel is claiming that punishment is more than any one penal feature. In the words of British Idealist Thomas Hill Green, ‘it is commonly asked whether punishment according to its proper nature is retributive or preventative or reformatory. The true answer is that it is and should be all three’.⁴⁰ Punishment is not one or the other, but all together.

This perspective on punishment has roots that predate even the *Science of Logic*. In his earlier essay on natural law, Hegel says:

In the case of punishment, one specific aspect is singled out – the criminal’s moral reform, or the damage done, or the effect of his punishment on others, or the criminal’s own notion of the punishment before he has committed the crime, or the necessity of making this notion a reality by carrying out the threat, etc. And then some such single aspect is made the purpose and essence of the whole. The natural consequence is that, since such a specific aspect has no necessary connection with the other specific aspects which can be found and distinguished, there arises an endless struggle to find the necessary bearing and predominance of one over the others.⁴¹

Here Hegel acknowledges ‘an endless struggle’ – seemingly without a clear resolution – between specific aspects of punishment. His point remains that the problem is philosophers of punishment insist on one-sided thinking claiming one aspect or view of punishment as a full theory of punishment. This is a problem because it neglects the fact that punishment is more than any one aspect. Punishments should be deserved and their uses can have deterrent or rehabilitative effects. It is unclear whether Hegel makes this point because he believes punishment’s capacity to deter means deterrence is a necessary aspect of punishment’s existence as a practice – even if he rejects deterrence as a reason to punish.

Hegel’s unified theory of punishment might be thought of as bringing together these different penal aspects together in a particular way. Punishment must be deserved, but its distribution is determined by the relevant circumstances affecting the crime’s impact on the stability of a particular civil society. The restoration of right may call for more deterrence, rehabilitation or other penal factor depending on these circumstances. In setting the value of punishment, we seek to restore the violated right and the form that punishment might take is justified where it best approximates what is required for the restoration of right.

This can avoid the concern that such a mix will lead to clashes because Hegel’s framework is guided by restoring right and not retribution, deterrence or rehabilitation. If it was guided by one aspect, then it is easy to see that clashes can arise between trying to punish offenders as much as deserved while trying to deter others – as what is deserved may be very different from what might deter. But since no one aspect is our guiding principle, this conflict is overcome. In seeking the restoration of right, we implement different aspects alone or in combination in the service of a shared goal – and so can avoid potential conflicts between them.

⁴⁰ Thomas Hill Green, *Lectures on the Principles of Political Obligation* (London: Longmans, 1941): §178). Green is discussing his own theory of punishment, but he was an early Hegel scholar and familiar with Hegel’s political thought – and familiar with Hegel’s logic in a way that few commentators are today.

⁴¹ G. W. F. Hegel, *Natural Law: The Scientific Ways of Treating Law, Its Place in Moral Philosophy and Its Relation to the Positive Sciences of Law*, trans. T. M. Knox (Philadelphia: University of Pennsylvania Press, 1975): 60.

Conclusions

Few areas of Hegel's philosophy are less controversial than his views on crime and punishment. The orthodox consensus claims Hegel was a retributivist. This reading is built off of the view that we need only concentrate on but one section – Abstract Right – in Hegel's *Philosophy of Right* in order to gain a complete, or near complete, grasp of his views. This orthodox consensus has become the dominant reading of Hegel's theory of punishment since Cooper's classic essay on this topic.

I have argued that the orthodox consensus runs into serious difficulties when we compare Hegel's comments about crime and punishment in Abstract Right with later parts of his *Philosophy of Right* and other writings. If the orthodox consensus is correct, then much of Hegel's claims must be wrong for reasons of inconsistency or incoherence. The consensus view that he endorses some standard view of retribution does not hold up when we consider his comments on punishment – and the case begins with remarks found in Abstract Right. Hegel is open to non-retributivist aspects so long as there is a necessary connection between crime and punishment. This connection is how he narrowly understands 'retribution'. For a philosopher who celebrated taking standard vocabulary and transforming it into something different in his philosophical lexicon, this should come as any surprise.

I argued that Hegel's comments are coherent if we took his philosophical methodology more seriously in a systematic reading of his texts. His works are not meant to be read as a series of sections or chapters that build off of each other like a story with beginning, middle and end. Instead, there is a structure where these different parts interpenetrate each other so that what is at the start foreshadows what comes later and retains its presence while following sections develop earlier insights in new directions.

Punishment offers an illustration of this at work. The earlier discussion about it in Abstract Right helps establish a foundation for what is to follow. This legal retributivist core – understood in Hegel's distinct way – does not rule out non-retributivist aspects from determining the shape of punishment as a practice. But as a practice in the world, it is necessarily affected by contingency – and so the circumstances under which crimes occur and punishment is distributed matter to how this is undertaken. Punishment never loses its retributivist heart mandating that it is deserved, but its distribution and amount can have shifting values depending on the possible harm that a crime threatens the stability of civil society with. For Hegel, such external factors are not a problem, but part of how punishment is conceived and practiced. Yet this is distinctly non-retributivist as standard views can reject their use.⁴²

Hegel does not offer any clear guide for how punishment should be distributed. I have argued that his views in Abstract Right foreshadow his later comments in Ethical Life in ways that show his theory is inconsistent with retributivism. I further argued that we can find comments in other texts, such as the *Science of Logic*, that are consistent only with this non-retributivist reading of Hegel's theory. Moreover, they indicate that he held a unified theory of

⁴² Retributivism is a broad church – and my argument is it's not broad enough to include Hegel's theory of punishment. But at least one view of retributivism – negative retributivism – can also take stock of external factors. It does so in different ways from standard and positive retributivism. Elsewhere, I argue it is the more problematic and inconsistent of retributivist views. See Brooks, *Punishment*, 96–99.

punishment bringing together aspects of retributivism, deterrence and rehabilitation. While he does not say much about how they might work together, his endorsing a unified theory – and not retributivism – appears to have been noticed by British Idealists like Green who echo similar positions.⁴³

Peter Steinberger makes the comment about his own interpretation of Hegel on crime and punishment that ‘it may be wondered how much of this account is really Hegel, and how much is merely inspired by certain Hegelian insights’.⁴⁴ There is an orthodox consensus about Hegel’s views that can find textual support for its positions. But it cannot account for all of Hegel’s comments about punishment. Taken together, Hegel offers a theory that breaks from the retributivist tradition and in so doing breaks new ground. The new reading of Hegel’s theory of punishment developed here is made possible by taking more seriously the argumentative structure that Hegel uses to construct his philosophy both within the *Philosophy of Right* and elsewhere in his system. A greater attention to the systematic structure – through a systematic reading – presents us with a deeper appreciation of Hegel’s philosophical contributions that corrects even widely held assumptions and so opens new possibilities previously obscured or closed off.

⁴³ See Thom Brooks, ‘T. H. Green’s Theory of Punishment’, *History of Political Thought* 24 (2003): 685—701; Thom Brooks, ‘Rethinking Punishment’, *International Journal of Jurisprudence and Philosophy of Law* 1 (2007): 24—34; Thom Brooks, ‘Was Green a Utilitarian in Practice?’ *Collingwood and British Idealism Studies* 14 (2008): 5—15; Thom Brooks, ‘Punishment and British Idealism’ in Jesper Ryberg and J. Angelo Corlett (eds), *Punishment and Ethics: New Perspectives* (Basingstoke: Palgrave Macmillan, 2010): 16—32; Thom Brooks, ‘Is Bradley a Retributivist?’ *History of Political Thought* 32 (2011): 83—95; Thom Brooks, ‘What Did the British Idealists Ever Do for Us?’ in Thom Brooks (ed.), *New Waves in Ethics* (Basingstoke: Palgrave Macmillan, 2011): 28—47; Thom Brooks, ‘On F. H. Bradley’s “Some Remarks on Punishment”’, *Ethics* 125 (2014): 223—25 and Thom Brooks, ‘Defending *Punishment*: Reply to Critics’, *Philosophy and Public Issues* 5 (2015): 73—94.

⁴⁴ Peter J. Steinberger, ‘Hegel on Crime and Punishment’, *American Political Science Review* 77 (1983): 870.